

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0577, State of New Hampshire v. Dean H. Garland, the court on December 15, 2004, issued the following order:

Following a jury trial, the defendant, Dean H. Garland, was convicted on two counts of aggravated felonious sexual assault. See RSA 632-A:2 (1996). On appeal, he contends that the trial court erred in refusing to disclose the guardian ad litem's summary of the victim's psychologist's clarification of his treatment notes. The State contends that the error was harmless. We remand for further proceedings consistent with this order.

"We review a trial court's ruling on the management of discovery under an unsustainable exercise of discretion standard." State v. Barnes, 150 N.H. 715, 719 (2004). To establish error under this standard, "the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case." Id.

The trial court found that confidentiality and any privilege attached to the counseling records had been waived; the records were therefore released to the parties. The defendant then sought to depose the victim's psychologist about two notes in the released records. The trial court limited the requested inquiry to written interrogatories about the two notes and further ordered, "If the complaining witness through the GAL asserts a privilege, he shall so notify the defendant." The GAL objected to the questions, citing New Hampshire Rule of Evidence 503(b). He also submitted to the court for in camera review his summary of the psychologist's answers to the questions.

Because the privilege was waived and the counseling records disclosed, the privilege could not be reasserted. See N.H. R. Ev. 510. Having concluded that the failure to disclose the GAL summary to the defendant was error, we remand this case to the trial court for further proceedings. The court should order a new trial unless it finds beyond a reasonable doubt that the error of nondisclosure was harmless. See State v. Fox, 150 N.H. 623, 624 (2004) (setting forth harmless error analysis); cf. State v. Amirault, 149 N.H. 541, 545 (2003) (remanding for new trial unless trial court found error was harmless).

Remanded.

BRODERICK, C.J., and NADEAU and DALIANIS, JJ., concurred.

**Eileen Fox,
Clerk**

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